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Atlas Stock Transfer Corporation v. Johnson Bowles Company, Sharon Owen and Seed Products International, Inc. : Brief of Respondent

Utah Court of Appeals

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IN THE SUPREME COURT

STATE OF UTAH

ATLAS STOCK TRANSFER CORPORATION,

Plaintiff,

Vs.

JOHNSON BOWLES COMPANY, SHARON OWEN and SEED PRODUCTS INTERNATIONAL, INC., a Delaware corporation (formerly In-Tec International (U.S.A.), Inc.),

Defendants.

88 47-CA

Docket No. 870239

RESPONDANT'S BRIEF

Appeal from Judgment of the Third Judicial District Court
in and for Salt Lake County, State of Utah
The Honorable Richard Moffet, Judge, Presiding

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(U.S.A.), Inc., Defendant and
Appellant

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STATEMENT OF THE CASE

In August of 1986, Respondent, Sharon Owen, through Johnson-Bowles a local stockbroker, presented Certificates representing Twenty Thousand (20,000) shares of common voting stock of In-Tec International (U.S.A.), to Atlas Stock Transfer for transfer into the name of Johnco - the nominee for Johnson-Bowles Company so that a sale could be effected pursuant to Rule 144 of the Securities and Exchange Commission.

Sharon Owen was notified that the Company (In-Tec) had placed a stop transfer on the shares claiming inter-alia that Ms. Owen was not the owner of the shares and had not paid for them and further that Rule 144 had not been complied with.

Atlas, pursuant to Section 70A-8-401 et. seq., Utah Code Annotated (1953 as amended) waited thirty (30) days for In-Tec to either get a Court Order prohibiting the transfer or post a bond. When thirty (30) days passed, Atlas transferred the shares, but because of the conflicting claims, filed the interpleader action which is the current litigation.

Contrary to the Appellant's statement of the case (Appellant's Brief at 5), the interpleader was not filed to determine "the number of shares of In-Tec stock to which Sharon Owen was entitled", but was filed only to determine ownership of the Twenty Thousand (20,000) shares of In-Tec stock in the name of Johnco represented by Certificates SL 0005916, SL 0005917 and SL 0005918.

The issue of the reverse split was not raised in the complaint

filed by Atlas, nor was it raised in the answer filed by any of the defendants in the case.

In-Tec became Seed Products International during the pendency of the litigation and installed new officers and directors. This new management raised the issue of the 20-1 reverse split for the first time at the time of trial.

SUMMARY OF ARGUMENT

The District Court properly concluded, under principles of Estoppel, that In-Tec could not assert its own failure to file Articles of Amendment, as required by statute, for over six (6) months after a reverse split had been approved by Shareholders of In-Tec and given effect by the transfer agent of the Corporation, as a basis for claiming that shares issued to Sharon Owen after the meeting approving the reverse split were subject to the reverse split.

ARGUMENT

The Trial Court correctly held that the Twenty Thousand (20,000) shares of In-Tec stock issued to Sharon Owen on August 9, 1984, were not subject to the 20-1 reverse split of shares approved by Shareholders of In-Tec on June 18, 1984.

The sole question presented by this appeal is whether or not the Twenty Thousand (20,000) shares of Seed Products stock which the Trial Court held was owned [1] by Sharon Owen, which shares

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1 The Trial Court held that Sharon Owen was the owner of the Twenty Thousand (20,000) shares of In-Tec stock represented

were authorized to be issued to Sharon Owen by the In-Tec Board of Directors on July 11, 1984, are subject to a 20-1 reverse split which reverse split was approved by Shareholders of In-Tec June 18, 1984, some three and one-half (3½) weeks prior to the Board action authorizing issuance of shares to Sharon Owen.

The facts necessary to a determination of the legal issues in this matter are not in dispute. These facts are as set forth in Appellant's Statement of Facts with the following additions:

1. The actions of the Shareholders on June 18, 1984, when the reverse split was authorized, authorized the reverse split of only the shares which were issued and outstanding at that time (See Ex. 13).

2. Atlas Stock Transfer, the agent of the Corporation, gave effect to the reverse split effective June 18, 1984, and reversed the outstanding shares of the Corporation, being the total of the issued and outstanding shares of the Corporation on that date and the exact number which the Shareholders had authorized to be reversed, on the transfer and registrar records of the Corporation as of that date.

Appellants argued that since the officers of the Corporation

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1 (Continued)

by Certificates SL 0005916, SL 0005917 and SL 0005918 in the name of Johnco which shares were the subject matter of the interpleader action. Seed Products (formerly In-Tec) has not appealed the finding of the Trial Court that Sharon Owen is the legal owner of said shares. The only finding of the Court which was appealed was the question of whether the said Twenty Thousand (20,000) shares were subject to the 20-1 reverse split, an issue which was not raised by Seed Products until the time of trial.

failed to file the Articles of Amendment from the May and June Shareholder's meetings until December, 1984, the shares of In-Tec issued to Sharon Owen, which all parties involved in the transaction understood not to be subject to the reverse split, must now be reverse split on a 20-1 basis.

The Trial Court correctly concluded that since the Corporation had issued the shares in compromise and settlement of a debt owed to Sharon Owen for services to the Corporation, and the intent of the then existing Board of Directors was to issue post-split shares, and the fact that the transfer agent issued post split shares which were understood not to be subject to the split, the Corporation could not now come into Court and be heard to claim that since the Amendments were not filed with the State of Utah (a situation caused by the Corporation's own negligent failure to act) Sharon Owen's shares must be reverse split on a 20-1 basis.

Respondent does not dispute that the statute (16-10-59) requires filing to make an Amendment effective. Respondent's claim is that the corporation is estopped to take advantage of its own failure to act as a basis for reversing a long-standing position taken by the Corporation, to-wit that the Owen shares were not subject to reversal.

The cases cited by Appellant in its brief all involve situations where the Corporation seeks the benefit of Board action in situations where a filing with the state is necessary to authorize the Board to act. Such a situation is totally opposite to the situation where estoppel is claimed to keep a corporation, which has for

some unknown reason failed to make the necessary state filings to give effect to an act on which third parties have relied, from claiming its own failure to file as required by law as a defense to the claims of third persons who have acted in good faith on the representation of the Corporation that its acts are effective.

Use of the legal doctrines of Estoppel in Pias and Quasi Estoppel have long been recognized as precluding such a result as sought by Appellant in this case.

The principle of Quasi Estoppel precludes a party from asserting, to anothers disadvantage, a right inconsistent with a position previously taken by him. The doctrine requires consistency of conduct when an inconsistency would cause injury to another. It precludes a party from taking advantage of his own fraud or wrongdoing. See 30 C.J. S. Estoppel § 107.

The principle of Quasi Estoppel requires no concealment of existing facts and no reliance. Its intent is to preclude a party from asserting, to anothers disadvantage, a right inconsistent with a position previously taken by him (in this case claiming the issuance of shares to Sharon Owen is subject to a 20-1 reverse split merely because the Corporation neglected to file Articles of Amendment until December, 1984, when it had represented to everyone, including Sharon Owen, that the split had been effected June 18, and she was getting post split shares). See El Paso National Bank v. S.W. Numismatic Inv. Group, Ltd., 548 S.W. 2d 942,948 (Tx. Civil App. 1977); Hamilton v. Hamilton, 251 S.e. 2d 441, 442, 296 N.C. 574 (1979); Jordan v. Jordan, 271 S.E. 2d 450, 246 Ga. 395 (1980).

Under the Doctrine of Quasi Estoppel, the regularity or validity of an act cannot be questioned by those who are responsible for it, and a person who prevents a thing from being done cannot later avail himself of the non-performance. Id. See Westinghouse Electric Corp. v. Pacific Gas and Electric, 326 F.2d 575 (9th Cir. 1964). In Rogers v. Hanson, 580 P.2nd 233, 234 (Utah 1978), this court held that "Generally, one is not permitted in a Court of Justice to take advantage of, or claim protection by reason of his own fraud." See In Re Unger, 220 N.Y.S. 2d 93, 28 Misc. 2d 513 (1961). In the case of Prudential Federal Savings and Loan Ass'n. v. William L. Pereira and Associates, 401 P.2d 439, 16 Utah 2d 365 (1965), this Court had an issue before it which was similar to the present case. The issue presented, as stated by the Court, was:

> "[W]hether a foreign corporation doing business in Utah, which refuses or fails to comply with our statutes, can claim an advantage by its non-compliance..." 401 P.2d at 441.

The Court held it could not and stated:

> "The ancient and honored maxim that no one should benefit from his own wrong is particularly appropriate here."

The same reasoning applies in the present case. Seed Products' predecessor corporations clearly held out to the world that the split had occurred prior to the settlement with Sharon Owen on the monies owed to her. It was the undisputed intent of the Board of the Corporation to issue post-split shares for settlement of the debt, and the transfer agent testified he did so. For some unknown reason the Corporation refused or failed to file

Articles of Amendment with the Corporations Division prior to issuing the shares. However, Sharon Owen relied on getting post-split shares in making her settlement, and took such shares in complete settlement of the debt owed by the Corporation. The reasoning in the Prudential Federal case controls. New management cannot, some three (3) years after the fact, take advantage of the Corporation's failure to file to effectively reduce the value of the settlement with Sharon Owen on a 20-1 basis.[2]

Appellants argue the statute is mandatory. However, as stated by this Court in Rice v. Granite School District, 456 P.2d 159, 162, 23 Utah 2d 22 (1969) "...estoppel may be found in the face of a mandatory statute." This principle appears to be uniformly accepted. See Crawford v. Thomas, 229 S.W. 2d 80 (Tex. 1950); Green v. State, 193 So. 312 (Ala. 1940). The Green case involved a mandamus action to require the Mayor and Alderman of a small town to canvas returns and declare and certify election results. The election had been ordered by a probate judge pursuant to law. It appeared that on the date set, the municipal election officers did not appear and so the election was held by the Election Inspectors as provided by law. The Mayor and Alderman failed for more than three (3) days to canvas the returns and declared the result and take steps to certify the election to state authorities as required by law to make the results official and binding under

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2 In the case of In Re Unger, Supra, the New York Court stated:

> One will not be allowed to bring about a condition by his own willful fact and then to further serve his purpose, be allowed to plead or take advantage of such condition. 220 N.Y.S. 2d at 97.

state law (it appared the election would cost the Mayor and Alderman their jobs by changing the form of government).

The ultimate question was whether by their inaction in failing to comply with the statutory filings, the Mayor and Alderman could bring about the result they wanted. In holding this could not be allowed the Court stated:

> One will not be allowed to bring about a condition by his own willful act, and then to further serve his purpose, be allowed to plead or take advantage of such condition. 193 So. at 314.

By accepting the benefit of the settlement contract and issuing Twenty Thousand (20,000) shares of In-Tec stock which everyone represented and understood to not be subject to the 20-1 reverse, Seed Products (formerly In-Tec) is estopped to question the validity of the shares even in the face of the Utah Statute § 16-10-59.

Quasi Estoppel applies to transactions where, as in this case, it would be unconscionable to allow a person to maintain a position inconsistent with one he ratified or acquiesed in See 30 CJS Estoppel P. 589 N.66.50. In McDonald v. LeNore, 540 P.2nd 671, 112 Ariz. 199 (1975) the Court stated:

> Quasi Estoppel differs from other forms of estoppel in that it appeals to the conscience of the Court to prevent injustice by precluding a party from asserting a right inconsistent with a position previously taken by him. 540 P.2d at 674. See Evans v. Idaho State Tax Comm., 540 P.2d 810, 812, 97 Ida. 148 (1975).

In the present case, to allow present management of the

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3 The principle of Equitable Estoppel requires consistency of position and conduct where inconsistency would work substantial injury to the other party. United Contractors, Inc., v. United Constuction Corporation, 187 So. 2d 695, 701 (Fla. 1966).

Corporation at this late date to take a position that the shares issued to Sharon Owen subsequent to the Shareholder approved reverse split and which were intended by the then Board of Directors of the Corporation to not be subject to the reverse split and which Sharon owen took in good faith reliance of their being post split shares would be unconscienable and an open invitation in the future to corporations to commit fraud by failing to make timely Amendments to their Articles of Incorporation.

The failure to make the filing required by § 16-10-59 is solely the responsibility of the Corporation. Having failed to do so for whatever reason, yet having represented to the world that the split was effective, the Corporation cannot now be heard to deny the validity of the Amendment based upon its own failure to file. See Prudential Federal Savings and Loan Ass'n v. William L. Pereira and Assoc., Supra; Green v. State; Grover v. Garn, 464 P.2d 598, 23 Utah 2d 441 (1970).

As a general principle, the evidence at trial "is reviewed in a light most favorable to sustain the findings and judgment of the trier of fact. Rogers v. Hansen, Supra at 234.

In the present case, the Trial Court found the shares to not be subject to the 20-1 reverse split and such result should be upheld.

CONCLUSION

For the reasons set forth hereinabove, the judgment of the Trial Court should be affirmed.

DATED this 22 day of October, 1987.

BOTTUM & WELLS, P.C.

By: /s/

CERTIFICATE OF SERVICE

I hereby certify that four (4) true and correct copies of the foregoing RESPONDENT'S BRIEF were mailed this 20th day of October, 1987, postage prepaid, to the following:

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